No. 15801

IN THE

United States
Court of Appeals
For the Ninth Circuit

GLADYS E. LINCOLN GRAMM,

Appellant,

vs.

ELIZABETH LINCOLN, Executrix of the Last Will and Testament of Henry Lincoln, Deceased,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Idaho, Southern Division

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CONSTITUTION AND STATUTES

U. S. CONSTITUTION, FOURTEENTH AMENDMENT, SECTION 1.— . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"JURISDICTION — ORIGINAL AND APPELLATE.—The district court has original jurisdiction:

1. In all cases both at law and in equity. * * *" Sec. 1-705 Idaho Code.

"TIME FOR PRESENTING CLAIMS. — The time expressed in the notice must be four months after its first publication." Sec. 15-602 Idaho Code.

"BAR OF CLAIMS NOT PRESENTED WITHIN TIME LIMITED. — All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever: *provided, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or a judge thereof, that the claimant had no notice as provided in this chapter by reason of being out of the state, it may be presented at any time before a decree of distribution is entered.*" Sec. 15-604 Idaho Code. (Italics are ours.)

"ALLOWANCE OR REJECTION OF CLAIMS. —When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator he must, within sixty days after its receipt, indorse thereon, his allowance or rejection, with the day and date thereof. If he allows the claim, he must within the same time present it to the probate judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. *If the executor, administrator, or judge reject the claim, or disallow any part thereof, he shall within ten days thereafter notify the claimant, his agent or attorney, by mail or personal notice of such rejection or disallowance. If the claim be presented to the*

executor or administrator before the expiration of the time limited for the presentation of claims the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time." Sec. 15-607 Idaho Code. (Italics are ours.)

"ACTIONS BY AND AGAINST EXECUTORS. —Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and *against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates.*" Sec. 15-803 Idaho Code. (Italics are ours.)

"SUIT ON REJECTED CLAIM.—When a claim is rejected either by the executor or administrator, or the probate judge, *the holder must bring suit in the proper court against the executor or administrator, within three months after notice of its rejection,* if it be then due, or within two months after it becomes due, otherwise the claim is forever barred." Sec. 15-609 Idaho Code. (Italics are ours.)

"FINAL DECISIONS OF DISTRICT COURTS. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court

for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." Sec. 1291, Title 28 USCA.

"CIRCUITS IN WHICH DECISIONS REVIEWABLE. Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district; * * *" Sec. 1294, Title 28 USCA.

"DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY. (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States:" Sec. 1332, Title 28 USCA.

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I. JURISDICTION

This Honorable Court of Appeals has jurisdiction of this appeal by reason of Sec. 1291 and 1294, Title 28, U.S.C.A.

The United States District Court for the District of Idaho, Southern Division, has jurisdiction of this suit under Sec. 1332, Title 28, U.S.C.A., in lieu of the state district court by reason of diversity of citizenship and amount involved alleged in com-

plaint, pp. 3, 4, 5, and 6; amended complaint, pp. 39, 40, 41, 42, 43, and 44; Pretrial Stipulation, pp. 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57 and 58; and reply to affirmative defense, pp. 19, 20, 21, 22, 23, and 24.

Also: Under Sec. 1-705 Idaho Code: "The district court has original jurisdiction . . . in all cases both at law and in equity . . ." and Gallivan v. Jones, 42 C.C.A. 408, 102 Fed. 423; also: Sec. 15-609 Idaho Code.

II. INTRODUCTORY SUMMARY

Under Rule 15(a), appellant is entitled to file her amended complaint whereby she seeks allowance of her non-resident creditor's claim as having had no actual notice, though such knowledge of the date of the first publication of the Notice to Creditors was requested, from the executrix and the unquestioned fact that appellant's claim was filed before the decree of distribution as allowed by statutes: Section 15-604 Idaho Code, and Section 15-607 Idaho Code.

The U. S. District Court for Idaho had jurisdiction because of diversity of citizenship and amount involved being over $3,000.00.

The executrix occupied a fiduciary position towards appellant and violated such duty by failing and refusing, when requested by appellant, to tell appellant the first date of publication of Notice to Creditors.

The decision of the State Supreme Court (In re Lincoln's Estate, 312 Pac. 2d 113) on appeal from

the Probate proceedings, is not res adjudicata because the parties and issues herein are not the same, appellee being sued in equity in her individual capacity, for unjust enrichment, extrinsic fraud, and violation of her fiduciary duty as executrix, the State Probate Court being without equity jurisdiction.

Also, that a trust should be impressed upon the funds of the estate distributed to appellee and as a suit for specific performance of the agreement sued on, or quasi-specific performance, it was unnecessary for appellant to file a claim.

If it was necessary to have filed a claim, suit thereon had to be in an independent action, which was not and could not have been encompassed in the preceding State appeal. Appellant seeks herein due process by a consideration of her claim on the merits as guaranteed by law. U. S. Constitution, 14th Amendment, Sec. 1.

III. STATEMENT OF PLEADINGS AND FACTS

Plaintiff and deceased, Henry Lincoln, then husband and wife, separated about 1937. Plaintiff was then, ever since has been and now is a resident of California. p. 46.

On March 2, 1937, Henry Lincoln obtained a divorce in Clark County, Nevada, from plaintiff on substituted service. Subsequently, both parties married, but not to each other. p. 46.

On September 14, 1938, plaintiff and deceased duly and regularly made a property settlement agreement wherein, among other provisions, deceased Henry Lincoln, agreed to pay plaintiff $125.00 per month during the rest of his natural life. p. 46. The agreement further provided "that the said parties hereto hereby accept the considerations moving to each of them under this agreement as a full and complete settlement of all property rights, and each party agrees to accept as a complete settlement of all his or her right to alimony, maintenance, attorney's fees and costs," p. 47, and "that this agreement is not made and shall not be construed as an agreement for or in aid of any divorce and that it is to remain in full force and effect whether the parties continue with the relation of husband and wife, or such relations may hereafter be dissolved for any cause whatever." p. 47.

Deceased, Henry Lincoln, never paid anything on this contract and died testate August 17, 1955, being then a resident of Boise, Idaho. p. 47.

Defendant, Elizabeth Lincoln, deceased's wife at the time of his death was, pursuant to the provisions of the Will, duly and regularly appointed executrix. p. 47.

On December 29, 1955, Joseph Shane of Los Angeles, California, attorney for the plaintiff, wrote the Clerk of the Probate Court, Ada County, State of Idaho, specifically asking if the Henry Lincoln Estate were then and there pending, pp. 47, 48. The Probate Court's answer did not specify the date

for presentation of claims, but did state that the estate was in the process of probate, p. 48. On February 6, 1956, plaintiff's attorney wrote appellee as executrix, c/o Karl Paine, her attorney, at the place designated for the presentation of claims, asking specifically for the date of first publication of the notice to creditors in order that the appellant might act, if necessary, as a non-resident creditor having no notice as provided in Chapter 6, Title 15, Idaho Code, Sec. 15-604, pp. 49, 50.

The attorney's answer did not give this information and expressly declined to give this or any information. p. 51.

On February 6, 1956, appellant presented her claim by letter from her attorney to respondent's attorney at the place designated for the presentation of claims, two days before respondent filed her first and final account and petition for distribution of the estate, February 8, 1956. On February 9, 1956, respondent's attorney acknowledged receipt of the claim. pp. 49, 50, 51, 52.

On March 16, 1956, appellant petitioned the Probate Court to vacate and set aside the decree of settlement and final distribution on the ground that respondent had falsely represented to the Court that all the debts of said deceased and his estate had been fully paid, whereas neither the decree nor the petition for distribution disclosed the filing of appellant's claim, which had been presented prior to the decree of distribution, and the appellee's affidavit stated none was presented. p. 54.

On April 5, 1956, appellant petitioned the Probate Court of Ada County, State of Idaho, for an extension of time for filing her creditor's claim by reason of appellant being out of the State, and having had no actual notice, directly or indirectly, of notice to creditors in the estate, praying for an order of the court extending time for filing of creditor's claim presented February 7, 1956, (erroneously shown as February 17, 1956. p. 55) and that defendant as executrix be ordered by the court to reject or allow and act upon her claim. This petition was accompanied and supported by affidavits of plaintiff and her attorney, Joseph Shane, and contains a statement that she was a non-resident of the State of Idaho and had no actual notice of the first publication of notice to creditors. No countershowing was made. Therefore, the non-residence and lack of actual notice of the first, or any, publication of notice to creditors are clearly established facts. p. 55.

A general demurrer, motion to strike and motion to overrule the above petition were interposed by respondent on the ground substantially that appellant's claim had not been filed within time, that is, within four months of the first publication of notice to creditors and that plaintiff had not applied to the Probate Court to extend the time for the presentation of claims and no order had been made relative thereto. p. 55.

The Probate Court sustained the Demurrer, Motion to Overrule and Motion to Strike as did the District Court of the Third Judicial District, Ada

County, State of Idaho, on appeal to said Court. pp. 55, 56. At the trial in the District Court further evidence was adduced to the effect that plaintiff was a non-resident of the State of Idaho, and had no actual notice of the first publication of Notice to Creditors, notice required by statute, as to when claims had to be filed, p. 56, under Sec. 15-602 Idaho Code, as a matter of fact as well as law.

Upon appeal to the Supreme Court of the State, it affirmed the action of the District Court, affirming the action of the Probate Court.

On May 5, 1956, appellant filed this suit in the District Court of the United States in the District of Idaho, Southern Division, as a suit on a rejected claim though the claim had never been, as such, rejected by the executrix, the record clearly showing two sustaining jurisdictional requirements, namely: diversity of citizenship and amount over $3,000.00. p. 46.

On July 23, 1957, appellant filed her amended complaint. p. 66.

On August 16, 1957, appellant lodged proposed amended complaint which is almost identical with but alleging a different date of contract than amended complaint actually filed on July 23, 1957. p. 66.

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so

amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." Federal Rules of Civil Procedure, Rule 15(a).

The above detailed facts are clearly shown without deviation or contradiction in the stipulation of facts filed herein, p. 46, except the typographic error in date of presentation. p. 55.

IV. SPECIFICATIONS OF ERROR

Appellant specifies as error that the learned trial court, by its order dated August 27, 1957, p. 66:

I

Erred in denying appellant's motion for leave to file her amended complaint thereby denying the Federal District Court's broad equity jurisdiction as the competent tribunal for trial of this suit and amendment under 15(a), Federal Rules of Civil Procedure.

II

Erred in refusing to exercise equity jurisdiction for specific performance of the agreement sued upon since the state probate court was wholly without

equity jurisdiction. In re Isaacson's Estate, 77 Idaho 12, 285, P. 2d 1061, Key No. Courts 200¼.

III

Erred in denying liability of appellee for unjust personal enrichment while withholding information specifically requested by a non-resident creditor, who had not received the notice or any notice to creditors provided by Chapter 6, Title 15, Idaho Code, being the notice to creditors referred to in Sec. 15-604 Idaho Code, and 15-607 Idaho Code, by reason of being outside the state of Idaho.

IV

Erred in not giving proper and complete consideration to the acknowledged fact that the claim had been actually presented prior to the decree of distribution in the Henry Lincoln Estate. pp 51, 52. Secs. 15-604 and 15-607 Idaho Code (last sentences).

V

Erred when it failed to recognize the equitable jurisdiction created through the probability that appellant, as the former wife, does not necessarily have to present her claim at all since the agreement sued on was made in consideration of the duty of support owed by decedent and upon her entire relinquishment of her entire property rights, it was entitled to performance. Ashbauth v. Davis, 71 Idaho 150, 227 P. 2d 951; 32 A.L.R. 2d 361; 21 Am. Jur. 96, Sec. 79, Notes 9, 19; Toulouse v. Burkett, Admr. 10 Pac. 26, 2 Idaho 184.

VI

Erred in due process of law, in violation of the Federal Constitution, in that appellant did not have any notice of the time within which claims had to be filed, although she had filed her claim and had become thereby an interested party at the time of the letter dated February 9, 1956, nine days prior to the date of decree of distribution and appellant was thereby unfairly denied recourse and equal treatment and protection under Sec. 15-604 and 15-607 Idaho Code, and guaranteed by the 14th Amendment, U. S. Constitution, Sec. 1.

VII

Erred in depriving appellant of her remedies, at law and in equity, by treating the Idaho Supreme Court decision In re Lincoln's Estate, 312 P. 2d 103, 79 Idaho, as determinative of all issues herein when that Honorable Court's opinion and decision had the effect, in this regard of merely denying appellant a plain, speedy and adequate remedy at law on that appeal concerning only the procedural law of the State of Idaho in probate matters, when there were no issues before that court on the several questions presented in this plenary suit in equity.

VIII

Erred in failing and refusing to hear on its merits the complaint of appellant, as amended, containing allegations of unjust enrichment of appellee, and specific performance.

IX

Erred in failing and refusing to consider the allegations of fraud raising the question of the competency of that Federal District Court to impress upon the estate in the hands of the distributee a trust in favor of appellant.

X

Erred in failing to take into consideration the fact that notice of rejection of the creditor's claim of appellant was never given in writing, or at all, by the executrix as required by Sec. 15-607 Idaho Code, thus depriving appellant of her right to file her affidavit under Sec. 15-604 Idaho Code before decree of distribution.

XI

Erred in failing to assume and exercise the full inherent equity powers of the Federal District Court as the proper and competent tribunal sitting in chancery, in lieu of the State District Court, on these allegations.

XII

Erred in failing to recognize the contradiction between facts stated in the pretrial stipulation and facts as stated in the Supreme Court's decision in the matter of presentation of the claim within the time allowed by Section 15-604 Idaho Code, since the statement of facts shows that the claim was presented ten (10) days before the decree of distribution was entered. p. 51. The Supreme Court decision on page 115, second column: "Neither the

affidavit mentioned in the section nor claim was presented in this case within the time prescribed." Sec. 15-604 Idaho Code (last sentence) does not prescribe any definite time at all for the filing of the affidavit referred to therein and grants absent claimants any time before decree of distribution in which to file creditors' claims.

XIII

Erred in failing to contra-distinguish between statutory provision in Sec. 15-604 Idaho Code relating to creditors "who have had no notice by reason of being out of the state" and the Supreme Court's decision in re Lincoln's Estate that "a non-resident creditor desiring to present a belated claim should apply for an order before the decree of distribution is entered," since the statute provides merely: "may be presented at any time before a decree of distribution is entered." Appellant's claim having been so presented, was presented in time.

XIV

Erred in failing to uphold the extremely high fiduciary duty owing by a fiduciary to out of state creditors without notice as provided in this chapter by reason of being out of the state, whereby this appellant was laboring under the very great disadvantage "out of the state."

V. ARGUMENT

This is a plenary suit in equity bottomed upon appellant's right to specific performance of the property settlement agreement sued upon and to impress a trust upon any estate in the hands of the distributee

resulting from her unjust enrichment in withholding from appellant the vital date of first publication of notice to creditors, which amounted to constructive fraud.

The record clearly discloses: (1) That the claim of appellant was presented ten days before the decree of distribution was entered, leaving ample time for her to file the requisite affidavit of lack of notice by reason of her absence from the State of Idaho, her non-residence, and her having no notice of the date of first publication of notice to creditors. (2) Specific request by appellant's attorney. (3) Refusal of appellee's attorney to give this or any information. (4) That appellant is a non-resident having no actual notice or knowledge of the first publication of notice to creditors by reason of being out of the state. pp. 49, 51, 52, 53, 54, 62, 63.

The last day for presentation of claims was January 29, 1956. The claim was presented February 7, 1956. At the time of presentation of the claim, the final account and petition for distribution stating all claims had been paid, were either filed or in the process of being filed, the same having been filed on February 7, 1956. The estate was still open and alleged in condition to be closed, but no actual notice of rejection of the claim had been given as required by Sec. 15-607 Idaho Code, in writing. Holt v. Michelson, 41 Idaho 694, 242 P. 977.

Claimant, therefore, had no notice of the first publication of notice to creditors, nor any written notice of the rejection of her claim, nor any other

notice excepting only knowledge of the pendency of the estate of Henry Lincoln, deceased, in the Probate Court of Ada County, Idaho, the name of executrix, and the name and address of her attorney. p. 48. Knowledge of the essential date of first publication of notice to creditors was so material as to be indispensable. There is a long recognized principle that a person who has had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact; but this appellant, through her attorney, had specifically requested the date when the first publication of notice to creditors was made. pp. 21, 49. Appellee's attorney responded, declining to give this or any information. pp. 21, 22, 51, 52. This was a clear breach of the legal and equitable duty which, irrespective of moral guilt, is, by law, declared fraudulent because of its tendency to deceive others.

In a well-reasoned decision, an out of state claimant who had learned of the death of his debtor but was entirely ignorant of the publication of notice to creditors, which he had never seen was held entitled to this much consideration. Sterling v. Title Insurance and Trust Company, 53 CA 2d 583, 128 P. 31. This is a most apropos case for consideration here, for the facts are similar, the main difference being in that appellant here has been both vigilant and diligent ever since discovery of the expiration date, January 29, 1956. p. 47.

The relationship between appellant and appellee is that of c' estui que trust, and fiduciary. Burns v. Skogstad, 206 P. 2d 765, 69 Idaho 227; Wiesenthal v. Goff, 120 P. 2d 248, 63 Idaho 342; Larrabee v. Tracy, 126 P. 2d 947, 951, Syl. 3-5.

Unjust enrichment is recognized in Idaho as the basis for such an action. Hixon v. Allphin, 281 P. 2d 1042, 76 Idaho 327; Madison v. Buhl, 51 Idaho 564, 8 P. 2d 271, 273. These equitable remedies were not available to appellant in the Probate Court. In re Isaacson's Estate, 77 Idaho 12, 285 P. 2d 1061.

Nor was the decision of the State Supreme Court res adjudicata. First, the parties are not the same, because herein the appellee is sued not only as executrix but as an individual. Second, the issues herein framed have never been before a court of general jurisdiction. Miller v. Mitcham, 21 Idaho 741, 123 P. 941; Schodde v. U.S. 69 F. 2d 866, WKS Judgment 713(3); Melgard v. Moscow Idaho Seed Co., 251 P. 2d 546, 73 Idaho 265.

"While many courts have insisted and still insist that the doctrine or principle of the law of the case is good law and should be applied in all cases, there has been a considerable tendency, and probably a growing one, to make an exception where it clearly appears that the former decision was erroneous; and, as a consequence, there is respectable authority to the effect that a decision rendered on one appeal, if clearly erroneous, is not conclusive upon the court upon a subsequent appeal of the same case." 3 Am. Jur. 547.

Counsel for appellee not only expressly refused to give any information, but wholly failed to act upon the claim as such, either by allowance or rejection thereof, and made formally no objection to the claim either as to time of filing or as to form. pp. 51, 52, 53, 54. In the light of this record, it is obvious that an injustice has been done and that this non-resident creditor who had no notice of the date of first publication of notice to creditors, or any of the contents thereof, by reason of being outside the State of Idaho, was deprived of her day in court by lack of due notice. No judgment of a court is due process of law if rendered without jurisdiction of the court or without notice to the party. Scott v. McNeal, 154 U. S. 34, 14 S. Ct. 1107, 1112; Roller v. Holly, 176 U.S. 398, 208 S. Ct. 410, 44 L. Ed. 520.

That the question of the reasonableness of the notice provided for by state statute in in rem proceedings involves a vital element of due process, and that the decision of the state is not binding on the federal court, was held in Scott v. McNeal, 154 U.S. 34, 14 S. Ct. 1107, 1112, 38 L. ed. 896; also Larrabee v. Tracy, supra.

Extrinsic fraud is fraud or deception practiced upon a party by his adversary, which has prevented the former from trying his case, or from having a real contest of the subject matter, and all of the elements of actionable fraud must exist. Keane v. Allen, 202 P. 2d 1031, 70 Idaho 122; Penn Mutual Life Insurance Company v. Beauchamp, 57 Idaho 530, 66 P. 2d 1022, the Idaho case most nearly

approaching the situation here presented, we quote:

"When an application has been made by a creditor to present a claim against the estate of a decedent, after the expiration of the time limited in the notice for presentation of claims, supported by an affidavit containing statements, which, if true, justify the issuance of an order that such claim may be presented at any time before decree of distribution is entered, an order should be made permitting its presentation. If when presented it is rejected, an action may be commenced to establish the claim against the estate, and the executor or administrator may present any defense thereto he may have, including the statute of limitations contained in Sec. 15-604," citing Tropico Land and Improvement Company v. Landbourne, 170 Cal. 33, 148 P. 206, and U. S. Gypsum Company v. Shaffer, 7 Cal. 2d 454, 16 P. 2d 998.

"One fundamental principle should be constantly kept in mind; . . . 'equity jurisprudence' . . . underlies all particular rules, and furnishes the solution for most of the special questions which can arise. In all those states which have adopted the entire system of equity jurisprudence, whatever be the legislation concerning the powers and functions of the probate courts, and whatever be the nature and extent of the subjects committed to their cognizance, the original equitable jurisdiction over administrators does and must still exist, except so far and with respect to such particulars as it has been abrogated by express prohibitory, negative language of the statutes, or by

necessary implication from affirmative language conferring exclusive powers upon the probate tribunals." 3 Pomeroy's Equity Jurisprudence, 3rd ed., Sec. 1153, p. 2249.

Referring to an identical statute, the California Supreme Court, in Cullerton v. Mead, 22 Cal. 98 said: "This is a remedial statute, and it must, therefore, be construed liberally, and when the meaning is doubtful, it must be so construed as to extend the remedy."

And the Idaho Supreme Court has said: "It is the duty of courts so to construe statutes as to make them effect their evident purpose and harmonize their various provisions with one another, and when the application of these rules still leaves a question of doubt, the principles of Justice must determine the doubt." Lamkin v. Sterling, 1 Idaho 92.

A very enlightening discussion of the subject of notice is likewise found in Larrabee v. Tracy, 126 P. 2d 947, 951, which was affirmed on appeal in 134 P. 2d 265. "Equitable jurisdiction exists and will be exercised in all cases, and under all circumstances, where the remedy at law is not adequate, complete and certain, so as to meet all the requirements of justice. That there is a legal remedy is not enough; such remedy, in order to oust or prevent the equitable jurisdiction must be in all respects as satisfactory as the relief furnished by a court of equity." 1 Pomeroy's Equity Jurisprudence, 3rd ed. 515, Sec. 297, quoted with approval by the Supreme Court of Idaho, in Coleman v. Jaeggers, 85 P. 895, 897; 50

Am. Jur. 419, Sec. 393, Note 13; also, 21 Am. Jur. 886, Sec. 916, Notes 6, 16.

Turning, now, to the matter of constructive fraud: WKS, Fraud 6, 7, 10. Appellant contends this fraud was extrinsic: "Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud." Rogers v. Stacy, 318 P. 2d 1116, 1118.

"A court of equity under its general powers has the power to inquire into the account of an executor or administrator where some ground for the exercise of equitable jurisdiction such as fraud, misrepresentation, or mistake is clearly established provided the complaining party has exercised diligence, and is not guilty of laches. A delay of eight months after the entry of an order settling an administrator's account before bringing a suit in equity for relief as to require the denial of the relief sought." 21 Am. Jur. 685, Sec. 542. Here, appellant filed her claim ten days before decree of distribution was entered, but her claim was not considered on the final settlement of the estate. She thereupon appealed promptly within the period prescribed by law, but the state courts held that on appeal from the Probate Court, they could not consider any item not at issue in the Probate Court.

"There is an admitted exception to the general rule in cases where, by reason of something done by a successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interests to the other side, these and similar cases which show that there has never been a real contest in the trial nor hearing of the case, are reasons for which a suit may be sustained to set aside the former judgment or decree, and open the case for a new and fair hearing." United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Blood v. Templeton, 152 Cal. 148, 92 P. 78, 13 LRA(NS) 579, 584.

The successful plaintiff in a suit for relief against extrinsic fraud in a procurement of a decree of distribution is allowed an equitable lien on the property which the defendant secured, if such property can be identified. Purinton v. Dyson, 8 Cal. 2d 322, 65 P. 2d 777.

Extrinsic fraud, which justifies a court of equity in setting aside a decree is one which prevents a party claiming to be injured from having a trial or

presenting all his case in court and does not apply to any matter which was actually presented and considered. Van Gilder v. Warfields Unknown Heirs and Devisees, 120 P. 2d 243, 246, 63 Idaho 328.

With this appellant, as creditor, and this appellee, as executrix, a positive duty rested upon the executrix to fully, fairly and frankly advise the court as to all facts and all information in her possession, particularly by reason of the disadvantage of non-residence of appellant and having no notice to creditors by reason of being out of the State of Idaho. Burns v. Skogstad, 69 Idaho 227, 206 P. 2d 765; Gerlack v. Schultz, 72 Idaho 507, 244 P. 2d 1095, 1098; Simonton v. Simonton, 33 Idaho 255, 193 P. 386.

". . . equity is more liberal in its remedies than is law and often affords relief of a different character or under circumstances which the law will not recognize. 1 Story's Equity Jurisprudence (14th Ed.). 5. In relieving from fraud, courts of equity often go, not only beyond, but even contrary to the rules of law. Id. 261. In this case, adequate remedy of law being absent, the broad powers of equity will not be stayed and see injustice done merely because the fraud charged involved violation of a rule of court. Equity is too flexible for that.

"It matters little as to the mode or manner in which fraud is effected. A court looks to the effect and asks if the result is a consequence of fraud. For any description of mala fides practiced in obtaining a judgment, equity will grant relief." 15 RCL 761.

"In general, it may be stated that in all cases where by accident, or mistake, or fraud, or otherwise a party has an unfair advantage in proceedings in a court of law which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using that advantage which he has thus improperly gained." State, ex rel Happel v. District Court, 38 Mont. 166, 99 P. 291, 35 LRA(NS) 1098, 129 Am. St. Rep. 636.

Having answered the letter, containing the request for the specific information so vital to appellant's counsel, it became the legal and equitable duty of the fiduciary's counsel to answer the question with all frankness, candor, and fullness, even as such fiduciary client would be compelled to answer under those circumstances. Armed with the necessary affidavit that appellant had not received notice to creditors by reason of being out of the state of Idaho, appellant's counsel could have brought the claim to hearing.

Such failure to answer the inquiry amounted to a concealment of the most vital date of first publication of notice to creditors which is the notice referred to "as provided in this chapter," the exact information specifically requested by appellant's counsel for the very reason that he wished to file an affidavit, if necessary.

The fiduciary cannot, after concealing that very information, now be heard to urge that the affidavit

was not filed in time, when the essential claim had been presented before decree of distribution entered, a fact which she has admitted.

Can this be due notice? Can this be good faith? We submit that this constituted a constructive fraud, whether intentional or unintentional.

"It is not necessary to hold that the acts in question were done with intent or design to deceive; but the test is: Did they mislead and thereby induce a party to omit the assertion of a right? In this case the record does not, in our opinion, indicate any wrongful or fraudulent design on the part of the attorney. But the finding of the court to the effect that the defendants did rely upon the conversation as a reason for not pleading within time has support in the evidence, even though no such purpose was intended by the attorney." Bullard v. Zimmerman, 88 Mont. 271, at page 279, 292 P. 730, 733, Kirby v. Hoeh, 94 Mont. 218, 21 P. 2d 732, 735.

"A court of equity, under its general powers, has the power to inquire into the account of an executor or administrator, where some ground for the exercise of equitable jurisdiction, such as fraud . . . is clearly established." 21 Am. Jur. 685, 542.

"But a settlement cannot be impeached in a separate suit by parties having notice of the proceeding because of fraud on an item which was a matter of consideration by the probate court." 21 Am. Jur. 685, Note 18.

We submit, the claim having been presented before the decree was entered, by a non-resident having no

notice, by reason of being out of the state, having no actual knowledge of the date of first publication, which she requested specifically, but the executrix having denied this material information thus committing extrinsic fraud, this cause is an independent equity suit based on diversity of citizenship and this claimant is entitled to a trial thereof on the merits. If so, the proposed amendment of the complaint should be allowed.

Respectfully submitted,

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Service accepted, and copy of the foregoing brief received, January 24th, 1958.

Karl Fain L.

J. M. Liggat

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